Toh Hong Cheng v Bumiputra-Commerce Bank Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–50 OF 2001
MOHD HISHAMUDIN J
6 FEBRUARY 2008

Civil Procedure — Judgments and orders — Omission in court order — Claim premised on three causes of action — Order merely held defendant liable and assessment of damages by senior assistant registrar — Whether too vague — Whether ought to be set aside — Rules of the High Court 1980 O 92 r 4

The plaintiff's claim was premised on three causes of action, namely, breach of contract, negligence and defamation. The plaintiff alleged that the defendant bank delayed in clearing the plaintiff's Standard Chartered Bank ('SCB') cheque and crediting RM100,000 into his account. The plaintiff, not knowing that the SCB cheque had not been cleared, drew a Bumiputra-Commerce Bank Bhd ('BCB') cheque for RM100,000 which the defendant did not honour and had also defamed him by falsely and maliciously writing on the BCB cheque of and concerning the plaintiff the words 'Refer to drawer'. The learned judge, on the day of the hearing, after hearing the submissions (without the benefit of a trial) made a finding that: 'the defendant failed to give reasonable explanation for the delay. The defendant is liable. Costs for the plaintiff. Damages to be assessed by the learned senior assistant registrar ('SAR')'. The SAR awarded RM20,000 for the delay in clearing the SCB cheque, RM10 as nominal damages in not honouring the BCB cheque and no damages awarded for defamation on the plaintiff's credit and reputation. The plaintiff appealed against the decision of the SAR on the assessment of damages.

Held:

(1) Having considered the written submissions of both sides, the court neither allowed the appeal nor dismissed the same. Instead, with the view to prevent injustice, the court exercised its powers under O 92 r 4 of the Rules of the High Court 1980 ('the RHC') to set aside the order of the learned judge as well as the order of the SAR; and ordered the plaintiff to file Form 63 pursuant to O 34 of the RHC for case management with a view to have this case ready for a proper trial (see para 2).

(2) The learned judge in making a finding said that the 'defendant is liable'. But the pertinent question was: liable for what? A finding of liability must relate to a cause of action. The finding could not relate merely to an act or omission. An act or omission, although it might amount to a wrongdoing, nonetheless was not actionable (and the doer could not in law be held liable) unless the act or omission gave rise to a cause of action recognised by law (see para 15).

(3) The questions as to whether the defendant was liable for breach of contract or negligence or defamation in respect of all the three causes of action had to be asked and answered, for the quantum of damages would follow the nature of the liability (or liabilities). The legal problem was that it was not possible to carry out any assessment of damages unless one was clear as to the nature of the liability (or liabilities). In view of the absence of a proper finding of liability by the trial judge, the decision of the SAR on the assessment of damages must necessarily be speculative or guesswork in nature (see paras 16 & 19).

[Bahasa Malaysia summary

Tuntutan plaintif berasaskan tiga kausa tindakan, iaitu kemungkiran kontrak, kecuaian dan fitnah. Plaintif menyatakan bahawa defendan bank lewat menjelaskan cek Standard Chartered Bank ('SCB') plaintif dan mengkreditkan RM100,000 ke dalam akaunnya. Plaintif tanpa mengetahui bahawa cek SCB beliau masih belum dijelaskan, membayar satu cek Bumiputra-Commerce Bank Berhad ('BCB') untuk RM100,000 yang tidak dilunaskan oleh defendan dan juga telah memfitnahnya secara palsu dan berniat jahat menulis di atas cek BCB tentang dan berhubungan dengan plaintif perkataan-perkataan 'Refer to drawer'. Hakim yang bijaksana, pada hari perbicaraan, selepas mendengar hujah-hujah (tanpa sebarang perbicaraan) telah membuat penemuan bahawa: 'the defendant failed to give reasonable explanation for the delay. The defendant is liable. Costs for the plaintiff. Damages to be assessed by the learned senior assistant registrar ('SAR')'. SAR telah mengawardkan RM20,000 untuk kelewatan menjelaskan cek SCB, RM10 sebagai ganti rugi nominal kerana tidak melunaskan cek BCB dan tiada ganti rugi diawardkan untuk fitnah ke atas kredit dan reputasi plaintif. Plaintif merayu terhadap keputusan SAR dalam mentaksirkan ganti rugi.

Diputuskan:

(1) Setelah menimbangkan hujah-hujah bertulis kedua-dua pihak, mahkamah tidak membenarkan mahupun menolak rayuan tersebut. Sebaliknya, untuk menghalang ketidakadilan, mahkamah

menggunakan kuasanya di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk mengenepikan perintah hakim yang bijaksana dan juga SAR; dan memerintahkan plaintif memfailkan Borang 63 mengikut A 34 KMT untuk pengendalian kes agar ia dapat disediakan untuk perbicaraan sewajarnya (lihat perenggan 2).

(2) Hakim yang bijaksana dalam membuat penemuan menyatakan bahawa 'defendant is liable'. Akan tetapi soalan yang penting ialah: bertanggungan untuk apa? Satu penemuan liabiliti mestilah berkait dengan satu kausa tindakan. Penemuan tersebut tidak boleh berkait hanya kepada satu tindakan atau peninggalan. Satu tindakan atau peninggalan, walaupun ia mungkin membentuk satu perbuatan salah, masih tidak boleh diambil tindakan (dan pembuat tidak boleh di bawah undang-undang dipersalahkan) kecuali tindakan atau peninggalan tersebut membangkitkan satu kausa tindakan yang dikenali undang-undang (lihat perenggan 15).

(3) Soalan-soalan sama ada defendan bertanggungan untuk kemungkiran kontrak atau kecuaian atau fitnah berhubungan dengan ketiga-tiga kausa tindakan perlu ditanya dan dijawab, oleh kerana kuantum ganti rugi akan mengikut sifat liabiliti (ataupun liabiliti-liabiliti). Masalah undang-undang ialah bahawa ia tidak berkemungkinan menjalankan sebarang penaksiran ganti rugi kecuali seseorang jelas akan sifat liabiliti (ataupun liabiliti-liabiliti). Memandangkan ketiadaan penemuan sewajarnya terhadap liabiliti oleh hakim bicara, keputusan SAR berhubung penaksiran ganti rugi semestinya hanya spekulatif dan bersifat teka-meneka (lihat perenggan 16 & 19).]

Notes

For a case on omission in court order, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4178.

Legislation referred to

Civil Procedure Code (FMS)
Rules of the High Court 1980 O 33 rr 2, 5, O 34, O 35A, O 38 rr 1, 2, O 92 r 4, Form 63
Rules of the Supreme Court 1957

Yee Teck Fah (Yee Teck Fah & Co) for the plaintiff.
Jasvinder Kaur (Azim, Tunku Farik & Wong) for the defendant.

Mohd Hishamudin J:

[1] Enclosure 28 is an appeal by the plaintiff against the decision of the learned senior assistant registrar ('the SAR') on assessment of damages.

The decision was given on 2 December 2004. The plaintiff is dissatisfied with the award. I will deal with the nature of the award in due course.

[2] In hearing this appeal, after considering the written submissions of both sides, I neither allowed the appeal nor dismissed the same. Instead, with the view to prevent injustice, I exercised my powers under O 92 r 4 of the Rules of the High Court 1980 ('the RHC') to set aside the order of the learned judge as well as the order of the SAR; and ordered the plaintiff to file Form 63 pursuant to O 34 of the RHC for case management with a view to have this case ready for a proper trial.

[3] I did so for the following reasons.

[4] Firstly, the learned judge, in making a finding of liability in favour of the plaintiff did not hold a proper trial before arriving at his finding. At the 'trial' in open court on 30 October 2002 before the trial judge, no witnesses were called and no evidence was recorded. The learned judge only directed counsel for both sides to make oral submissions before him. And both counsel made brief submissions. At the end of the submissions he proceeded to make a finding of liability, followed by an order that damages be assessed by the SAR. What actually transpired at the hearing before the learned judge can be seen from the minutes in the case file, and it is as follows:

> Coram: YA Tuan Hakim Dato' Azmel bin Haji Maamor
>
> Encik Yee Teck Fah bersama Cik Ong Gek Lin bagi pihak plaintif
>
> Encik Wong Hok Mun bagi pihak defendan
>
> Kandungan 1
>
> Isu liabiliti sahaja.
>
> Untuk satu isu sahaja.
>
> Sama ada defendan melewatkan akaun plaintif 16 hari salah atau tidak?
>
> Peguam plaintif berkata defendan tidak memberi apa-apa alasan di atas kelewatan itu. Oleh itu pohon perintah seperti dipohon dan ganti rugi ditaksir oleh SAR.
>
> Peguam defendan: Reasons for the delay.
>
> This took place during the merger between BOC and BBMB. The Kuantan branch did not share the same computer platform with the Ampang branch which was formerly Bank of Commerce.
>
> Mahkamah: Defendant failed to give reasonable explanation for the delay. The defendant is liable. Costs for the plaintiff. Damages to be assessed by the SAR.

[5] When I asked counsel for both sides to enlighten me as to the procedure adopted by the learned judge in not holding the ordinary mode of trial before calling for submissions, both counsel could only inform me that the 'trial' took place during the days of the 'fast track system', and they proceeded in the manner as shown in the minutes because they only did what was directed by the trial judge. When I asked both counsel further whether any of them had made any application (be it oral or written) before the trial judge for the trial to proceed in accordance with O 33 r 2 of the RHC, they answered in the negative.

[6] The trial judge, unfortunately, did not give any grounds for his decision. There is nothing in the minutes as recorded to show which rule of procedure was adopted by the learned judge when he held the trial in the manner that he did.

[7] Now, reverting to the present appeal, the hearing of this appeal commenced on 24 May 2005. On that day I directed the parties to file their respective written submission. After reading the submissions and the record of proceedings both before the learned judge and the SAR, for the reasons that I have lamented a moment ago in this judgment, I felt troubled by the procedure adopted by the learned judge at the trial before him and by the order that he made regarding the issue of liability (I was also troubled by the decision of the SAR — but I will deal with his order later). Accordingly, at the second hearing date of this appeal, that is, on 29 August 2005, I directed the plaintiff's/appellant's counsel to write to the secretary of the learned judge for the notes of the proceedings as recorded by the judge in his notebook, just in case what was recorded in the judge's notebook was more elaborate than what is recorded in the minutes in the case file. However, on 13 March 2006, at the continued hearing of this appeal, the counsel for the plaintiff reported to me that he had written to the secretary of the learned judge, as directed by me, but unfortunately did not get any response. Hence, in order to know what actually transpired at the hearing on 30 October 2002, I had no choice but to rely solely on the notes/minutes as recorded in the case file.

[8] In my judgment, with respect, the procedure adopted by the learned trial judge was highly irregular as to render the whole trial a nullity. As a general rule a trial must be conducted in accordance with O 38 of the RHC (read with O 35A, which relates to witness statements). Witnesses must be called to read out their witness statements and be examined orally (cross-examination, re-examination and questioned by the trial judge). This has always been the practice and procedure since the English rules of procedure were introduced to this country and statutorily enforced by the Civil Procedure Code (FMS), Rules of the Supreme Court 1957 and now by the RHC. And when the short-lived 'fast track system' was introduced in

2002/2003 there were no amendments made to the RHC to implement the system. The system was found not to be working as expected and was soon abandoned.

[9] Now, O 38 r 1 reads:

> General rule: Witnesses to be examined orally.
>
> Subject to the provisions of these rules and of the Evidence Act 1950 and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

[10] It is, however, true that a trial judge has wide powers to determine the mode of trial as provided for, for instance, by O 33 r 2 or O 33 r 5 or O 38 r 2 of the RHC and that in exceptional cases he may depart from the normal procedure as prescribed by O 38 r 1. But these are exceptional procedures and a judge must tread fairly and with care before adopting them.

[11] I do concede that, theoretically speaking, a court in exceptionally rare cases may dispose of a case merely by considering the agreed facts and the written submissions of parties. But in such a case as this, normally, the initiative would come from the parties themselves — and not from the judge. And the normal procedure is for the parties themselves to make a formal application setting out the salient agreed facts in full, the relevant documents in detail, and the issue (or issues) of law that they would like the judge to determine by way of submissions only. In the present case, however, one will note that the minutes in the case file do not show any oral application by either the plaintiff or the defendant on the day of the trial to invoke the exceptional procedures under O 33. And neither do the minutes in the case file show that the learned trial judge had at the commencement of the trial intimated to the parties that he intended to invoke his powers under O 33 r 2 (or r 5) to do away with the normal trial procedure of calling and examining witnesses, but to instead proceed merely by way of agreed facts and oral submissions, and had asked counsel of both sides their views as to whether they are agreeable to his proposal or not. Indeed, to repeat what I have pointed out earlier, when I asked counsel of both sides as to whether any application under O 33 r 2 was made by any of them, they answered in the negative. The impression that I gather from the minutes in the case file and from both counsel themselves is that the initiative came from the learned trial judge himself who omitted to invite counsel of both sides to express their views as to whether or not they were agreeable as to the mode of trial the judge intended to adopt. Further, although the parties in their submissions had made reference to the agreed facts, and that the sealed order of the judge dated 30 October 2002 at encl 20 also mentioned '*Pernyataan Fakta-Fakta*

Yang Dipersetujui', yet when one examines the minutes in the case file for 30 October 2002 there is no record of the trial judge having alluded to any statement of agreed fact (or to any bundle of documents).

[12] Secondly, the issue posed by the learned trial judge before the parties is not clear. The issue posed by him, as can be seen from the notes/minutes in the case file, is:

> Sama ada defendan melewatkan akaun plaintif 16 hari salah atau tidak?

This statement is crude and ambiguous. It is not appropriately framed. Indeed, it is meaningless. Thus, with respect, there is no proper formulation of the issue.

[13] Thirdly, the learned judge was also not clear on his finding of liability. Let us first examine the statement of claim. The relevant paragraphs of the statement of claim are as follows:

> 4. On or about 20 January 2001, plaintiff caused a cheque No 502452 ('SCB cheque') drew on Standard Chartered Bank Berhad for the sum RM100,000 payable to the plaintiff to be deposited with the defendant.
>
> 5. The SCB cheque should be cleared within two days from 20 January 2001 or thereabout, and that the said sum of RM100,000 should have been credited into the plaintiff's account, but in breach of the defendant's duty the SCB cheque was only cleared on or about 1 January 2001.
>
> 6. On or about 1 February 2001, the plaintiff not knowing that the SCB cheque had not been cleared and/or the defendant's breach of duty aforesaid, drew a cheque No 191727 ('BCB cheque') for the sum of RM100,000 payable to Koperasi Kijang Mas Negeri Pahang Berhad. When the BCB cheque was duly presented to the defendant for payment, the defendant wrongfully and/or in breach of his duty, dishonoured the BCB cheque.
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> 7. In the premises the plaintiff suffered loss and damage much inconvenience, including anxiety and nervous shock.
>
> 8. Further/and in the alternative, the defendant had falsely and maliciously wrote on the BCB cheque of and concerning the plaintiff the words 'Refer to drawer' ('defamatory words') and published the defamatory words to:
>
> (a) Koperasi Kijang Mas Negeri Pahang Berhad;

(b) Other parties to whom the defendant has published the cheque and has yet to be ascertained as at the date of this statement of claim.

9. ... (Further averments on defamation.)

10. By reason of the premises the plaintiff has also suffered serious injuries in his credit and reputation and in his business and has suffered loss and damage as a result thereof.

11. ... (Claim for aggravated and exemplary damages.)

12. In the premises, the plaintiff claims:

(a) damages under paragraphs 1–7 hereof and interest thereon at the rate of 8% per annum or such other rate this court deems just from 6 April 2001 or such other date as this court deems fit, to the date of full realisation;

(b) damages under paragraphs 8–11 hereof (including aggravated damages) and interest thereon at the rate of 8% per annum or such other rate this court deems just from 6 April 2001 or such other date as this court deems fit, to the date of full realisation;

(c) costs;

(d) such further or any other relief as this court thinks reasonable and proper to grant.

It can easily be gathered from the above statement of claim that the plaintiff's claim is premised on three causes of action. As to the first cause of action, the plaintiff is alleging breach of contract on the part of the defendant bank. As to the second cause of action the plaintiff is alleging negligence on the part of the defendant bank. As regards the third cause of action, the plaintiff is alleging that the defendant bank had defamed him. Since the nature of the plaintiff's claim is such, it is incumbent then upon the court to make three findings, that is:

(1) as to whether the defendant is liable for breach of contract;

(2) as to whether the defendant is liable in negligence; and

(3) as to whether the defendant is liable in defamation.

[14] However, in the present case, the learned judge, on the day of the hearing, after hearing submissions (without the benefit of a trial) did not make a clear finding on liability. This can be seen from the minutes in the case file as set out above. The finding on liability was merely:

A Mahkamah: Defendant failed to give reasonable explanation for the delay. The defendant is liable. Costs for the plaintiff. Damages to be assessed by the SAR.

[15] The learned judge merely says that the '*defendant is liable*'. But the pertinent question is: liable for *what*? A finding of liability must relate to a cause of action. The finding cannot relate merely to an act or omission. An act or omission, although it may amount to a wrongdoing, nonetheless is not actionable (and the doer cannot in law be held liable) unless the act or omission gives rise to a cause of action recognised by law.

[16] Hence, the following questions arise. Was the defendant liable for breach of contract? Was the defendant liable in negligence? Or was the defendant liable in defamation? Or was the defendant liable in respect of all the three causes of action? These questions have to be asked and need to be answered, for the quantum of damages will follow the nature of the liability (or liabilities). The legal problem is that it is not possible to carry out any assessment of damages unless one is clear as to the nature of the liability (or liabilities).

[17] It is unfortunate that in the instant case neither of the parties appealed to the Court of Appeal against the ambiguous decision of the trial judge. It is also unfortunate that neither counsel for the plaintiff nor counsel for the defendant sought an appointment with the trial judge seeking clarification to ascertain the actual finding on the issue of liability. The solicitors for the plaintiff proceeded to draw up the order, and eventually the sealed order reads:

> DAN SETELAH MENDENGAR Encik Yee Teck Fah bersama Cik Ong Gek Lin, Peguam-peguam bagi Plaintif dan Encik Wong Hok Mun, Peguam bagi Defendan ADALA DIPERINTAHKAN BAHAWA penghakiman dicatatkan menyebelahi Plaintif terhadap Defendan DAN ADALAH SELANJUTNYA DIPERINTAHKAN BAHAWA Defendan membayar Plaintif ganti rugi yang akan ditaksirkan dan kos yang akan ditaksirkan.

[18] Be that as it may, in spite of the vagueness of the judge's order on the issue of liability, the SAR, however, with respect, appears unperturbed: he diligently proceeded to carry out the assessment of damages. Witnesses were called to testify and evidence recorded. At the conclusion of the trial on the assessment of damages, the SAR made the following order:

> … DAN SETELAH ditetapkan untuk keputusan penaksiran ganti rugi pada hari ini di dalam kehadiran Cik Ong Gek Lin, Peguam Plaintif dan Cik Jasvinder Kaur, Peguam Defendan ADALAH DIPERAKUI bahawa ganti rugi yang ditaksirkan Menurut penghakiman bertarikh 30 Oktober 2002 adalah:

(a) RM20,000 berserta faedah ke atasnya pada kadar 8% setahun dari 6 Februari 2001 sehingga tarikh penyelesaian sepenuhnya untuk kelewatan menjelaskan cek Standard Chartered Bank Berhad No 502452 ('Cek SCB');

(b) RM10 sebagai ganti rugi nominal untuk cek Bumiputra-Commerce Bank Berhad No 191727 ('Cek BCB') yang secara salah tidak dilayan;

(c) Tiada ganti rugi dibenarkan untuk fitnah dan kerosakan kepada kredit dan reputasi plaintif.

[19] In view of the absence of a proper finding of liability by the trial judge, the decision of the SAR on the assessment of damages must necessarily be speculative or guesswork in nature? For, with regards to his decision, the following questions arise. With regard to limb (a) of the SAR's order, what was the cause of action that was assumed by him? With regard to limb (b) of the SAR's order, again, what was the cause of action that was assumed by the SAR? As to limb (c) of his order, is the SAR making a finding that the defendant is not liable in defamation? If so, can he make such a finding when that finding should have been made by the judge and the SAR's role was merely to assess the damages? Or, was the SAR assuming that there had been a finding (in favour of the plaintiff) made by the learned judge on the issue as to liability in defamation, and having conducted the assessment proceeding decided not to award any damages to the plaintiff? To repeat what has been said earlier in this judgment, it is not possible to carry out any assessment of damages unless one is clear as to the nature of the liability (or liabilities).

[20] In conclusion, I hold that both proceedings before the trial judge and the SAR were fundamentally flawed rendering it legally impossible for me to decide on the appeal. It would be wrong for me to embark on the realm of speculation. In my judgment, the only avenue thus opened to me under the circumstances was to invoke my inherent powers under O 92 r 4 to set aside the orders of both the trial judge and the SAR. With a heavy heart, I did so.

Order accordingly.

Reported by Sally Kee